Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

COMMENTS OF PAC-WEST TELECOMM, INC.

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SUMMARY

Pac-West Telecomm, Inc. ("Pac-West") submits these comments to encourage the Commission to modernize the intercarrier compensation system so that it functions predictably and in a pro-competitive manner. Such reforms will benefit all carriers and consumers if they eliminate arbitrary distinctions among both types of traffic and types of carriers, while at the same time avoiding a flash cut to a dramatically different rate regime.

As a first step, the Commission should make clear that VoIP traffic should be treated no differently than traditional TDM traffic. Given that the costs of originating or terminating a call do not vary based on the type of provider originating the call, there is no basis to create more categories of traffic when there is no support in the record for such distinctions. As part of its reform efforts, the Commission should develop a unified cost-based system to simplify the regulatory regime and reduce opportunities for improper arbitrage.

The Commission should also fix the current loophole that permits CMRS providers to refuse to pay CLECs a reasonable rate for the terminating services CLECs provide in completing wireless calls. Although the Commission's rules clearly mandate that CMRS providers must pay compensation, CMRS providers will have no incentive to pay anything for the services they take until the right of compensation is coupled with a comprehensive remedy for CLECs to compel arbitration. Finally, the Commission must act judiciously in resolving access stimulation complaints. Legitimizing IXCs' refusal to pay for certain types of traffic has only encouraged IXC self-help across the board.

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COMMENTS OF PAC-WEST TELECOMM, INC.

Pac-West Telecomm, Inc. ("Pac-West") submits these comments to the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceedings to encourage the Commission to take meaningful action to promote a predictable, pro-competitive and nondiscriminatory environment for all carriers while ensuring that consumers benefit from increased competition. Pac-West urges the FCC to take advantage of the information provided in response to its Notice of Proposed Rulemaking to adopt a new regulatory framework that will remove market distortions and provide regulatory certainty and a fair opportunity for new entrants to compete in the telecommunications sector.[1]

I. INTRODUCTION

A. About Pac-West Telecomm, Inc.

Pac-West is a wholesale communications provider, headquartered in California, with a facilities-based footprint in nine Western states. Pac-West is expanding its services across the country and soon expects to provide origination and termination services nationwide. Pac-West's services include both circuit-switched and IP-based services, traditional TDM wholesale services and a suite of wholesale IP-based products known as Telastic, which was recently named Internet Telephony Magazine's Product of the Year.

Pac-West's services, and those of similar providers, drive down intercarrier compensation rates, and consumer prices, every day by allowing providers to access the lowest market prices available. The simplest example is least cost routing ("LCR") termination services, whereby, as the name implies, carriers purchase from Pac-West, on a call-by-call basis, the least expensive way to terminate their traffic. In addition, through managed modem products, Pac-West can handle high volumes of Internet bound dial-up traffic with efficiencies and service quality levels that less specialized carriers can rarely imitate. And through its Telastic services, VoIP providers – which, from December 2008 to June 2010, have increased subscriptions by 32.9%[2] – find a means to enter and compete in the telecom marketplace, without any capital investment in

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1 In re *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, NPRM & FNPRM, FCC 11-13 (rel. Feb. 2011) ("NPRM").

2 Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2010*, at 2, Fig. 2 (March 2011).

telecommunications infrastructure. These VoIP providers offer innovative competitively-priced services with features and functions not previously available from traditional incumbent carriers.

Pac-West's TDM-based services can be broken down into origination, termination, and international services. Origination services – also known as dial access – offer local access numbers in an extensive number of rate centers, attractive to ISPs as well as call centers and other high-usage customers. Managed modem services are similar to origination services but include the management and scaling of the modems, so the customer does not have to invest in modem banks. Pac-West also offers traditional switched access services. While competitive local exchange carriers ("CLECs") like Pac-West are maligned as carriers that only receive traffic, Pac-West, as mentioned above, offers termination services where it pays other carriers to terminate large volumes of telecom traffic. These services include high quality international termination to anywhere in the world.

Pac-West's IP-based services are focused around the Telastic suite of services. Telastic is Telecom On-Demand – delivering real-time telecom services with cloud scalability, pay-as-you-grow pricing, and flexible delivery options. Telastic products harness the power of cloud computing, allowing customers to unite disparate systems, rapidly grow their product lines or efficiently scale their business. A call center that needs to rapidly expand its calling during the political season in September through November, but then wants to instantly scale back down to normal levels, can do that using Telastic. Telastic's carrier-grade building blocks include network components, operational systems and white-label applications that can be delivered as fully-managed, self-managed or infrastructure application services. The Telastic Session Border Controller provides a full suite of operator tools for managing IP-based communications traffic. Leveraging Pac-West's new hosted Session Border Control technology, this service includes granular least-cost routing capability, rating, billing, vendor management, revenue protection, numbers management, fraud control, and a unique embedded VoIP peering capability for instant interconnection. For a VoIP provider, it means instant access to all the telecom services needed to get into business. Telastic Virtual Machines provide instant capacity for communications applications, leveraging Telastic's cutting-edge virtualization service technology and optimized for real-time communications up and down the stack. This includes capability to easily choose phone numbers, provision them, and route them to applications automatically. Finally, Telastic White-Label Hosted VoIP provides a scalable and comprehensive packaged VoIP and PBX feature platform for white-label hosted IP/PBX and residential VoIP offerings.

B. Pac-West's Interest In The Proceedings.

As a carrier straddling the divide between traditional TDM and cutting-edge IP-based services, Pac-West believes the Commission should work towards an approach that treats all minutes the same, regardless of transmission technology. A predictable and reliable approach to VoIP traffic therefore must start out by treating such traffic the same as TDM traffic. In the world of telecom, Pac-West is a relatively small player and as such needs to be able to rely upon predictable and clearly-stated rule sets to establish the cost of originating and terminating traffic. That must include, critically, the enforcement of the existing legal mechanisms to collect under the current tariff system – a system that has been in place for decades. Any system that reverts to individual "commercial" arrangements between large carriers and hand-picked smaller carriers, will simply allow the largest carriers to dominate the jungle, rather than compete with equal co-carriers in an industry. Finally, another key driver of predictability is a regime that follows the Telecom Act's requirements for cost-based pricing of intercarrier compensation. Shifting sands mandating new, untested, and ultimately *ultra vires* rate regimes like bill and keep or non-

TELRIC rates (*e.g.*, $0.0007) will not provide a sure footing for either new entrants or incumbents alike.

II. THE COMMISSION SHOULD SIMPLIFY THE INTERCARRIER COMPENSATION SYSTEM

A. VoIP Traffic Should Be Treated Identically To All Other Traffic.

No justification exists for creating a new category of traffic for VoIP-originated or terminated calls. As the Commission has previously acknowledged, interconnected VoIP is a direct substitute for traditional voice telephone service.[3] To the extent that calls originating from or terminating to an interconnected VoIP provider use the PSTN, these calls should be treated identically to any other type of traffic. This position follows logically from the Commission's general principle that intercarrier compensation must be "competitively and technologically neutral" so that the rules "accommodate continuing change in the marketplace and do not distort the opportunity for carriers using different and novel technologies to compete for customers."[4] To achieve this goal, the Commission has previously acknowledged that,

> Similar types of traffic should be subject to similar rules. Similar types of functions should be subject to similar cost recovery mechanisms. …To the extent a proposed regime would preserve distinctions between types of carrier or types of traffic, such distinctions should be based on legitimate economic or technical differences, not artificial regulatory distinctions."[5]

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3 *See IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 at 6045-46 n.36 (2009) (citing a House of Representatives survey that in 2007 over nine million consumers used VoIP service as a substitute for traditional telephone service); *see also Local Telephone Competition: Status as of December 31, 2009*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, at 3 (Jan. 2011) ("Between December 2008 and December 2009 – the first full year of mandatory interconnected VoIP reporting – interconnected VoIP subscriptions increased by 22% (from 21 million to 26 million) and retail switched access lines decreased by 10% (from 141 million to 127 million). The combined effect was an annual decrease of 6% in wireline retail local telephone service connections (from 162 million to 153 million).").

4 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4702, ¶ 33 (2005).

5 *Id.*

With respect to VoIP originated and terminated traffic, there is no basis for the Commission to depart from this policy.

As an initial matter, most fixed VoIP services (such as those available through Comcast, Verizon, and Cox) are virtually indistinguishable from traditional telephony from a consumer perspective. Subscribers to these services pick up their phones, hear a dial tone, and can make and receive calls in the same manner that traditional telephone subscribers have for more than fifty years. As such, these types of services have little in common with true information service offerings where the service is "inextricably intertwine[d with] information-processing capabilities … such that the consumer always uses them as a unitary service."[6] Put simply, from the consumers' viewpoint, interconnected VoIP is indistinguishable from traditional voice traffic. As such, there is no rational consumer-oriented reason to treat traffic originated from or terminated to fixed or mobile VoIP service providers any differently than any other type of traffic.

Further, there is no legal justification for disparate treatment. The Act defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."[7] When IP-based voice applications are combined with the connectivity telecommunications carriers like Pac-West offer, the combined interconnected VoIP offering is essentially identical to most other forms of telecommunications traffic and the obligations related thereto:

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6 *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings*, CC Docket Nos. 02–33, 01–337, 95–20, 98–10, Report and Order, 20 FCC Rcd 14853, 14860 ¶ 9 (2005).

7 47 U.S.C. §153(47).

- Customers of interconnected VoIP service pay a fee for sending and receiving voice telephone calls;
- Calls using interconnected VoIP service use North American Numbering Plan (NANP) telephone numbers to facilitate voice calls throughout the PSTN;
- The traffic generated through the interconnected VoIP offering utilizes the PSTN and imposes costs on the underlying LEC network in the same way as other telecommunications providers;
- Interconnected VoIP providers are required to contribute to the Universal Service Fund and are eligible to receive USF support as Eligible Telecommunications Carriers;[8]
- Interconnected VoIP providers are subject to CALEA obligations;[9] and
- Interconnected VoIP providers are subject to 911-obligations.[10]

Indeed, in almost every other area where the FCC regulates telecommunications services, the Commission has chosen to treat the provision of interconnected VoIP service identically to traditional telecommunications service. There is no reason to deviate from this policy with respect to reciprocal compensation or access charges.

Treating IP-originated and IP-terminated traffic identically to traditional traffic is also prudent as a matter of policy. Regulatory arbitrage results from having widely varying rates for the same functions. As the Commission has acknowledged, the costs of handling traffic do not vary based on the nature of the traffic; an IP-originated call costs no more or less to originate or terminate than a TDM-originated call.[11] If the Commission were to move forward with a ruling

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8 *Universal Service Contribution Methodology*, Report & Order & NPRM, 21 FCC Rcd 7518, 7538-43, ¶¶ 38-49 (2006) ("*2006 Interim Contribution Methodology Order"*), *aff'd sub nom., in relevant part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) (establishing universal service contribution obligations for interconnected VoIP service providers).

9 *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report & Order & FNPRM, 20 FCC Rcd 14989, 14991-92, ¶ 8 (2005) (*CALEA First Report and Order*), *aff'd sub nom. American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006)

10 *E911 Requirements for IP-Enabled Service Providers*, First Report & Order & NPRM, 20 FCC Rcd 10245, 10246, ¶ 1 (2005) "(*VoIP 911 Order"*), *aff'd sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006) (requiring interconnected VoIP service providers to supply 911 emergency calling capabilities).

11 NPRM ¶ 495 (noting that one of the "fundamental problems with the current system … [was that] rates vary based on the type of provider and where the call originated, even though the function of originating or terminating a call does not change").

that IP-originated traffic is not subject to reciprocal compensation or access charges, IXCs and other carriers would be motivated to reclassify or reconfigure their networks to make their traffic appear IP-originated and thereby avoid access charges while LECs would have every incentive to not upgrade their networks.

Moreover, disparate treatment of this VoIP-provider traffic could create categories of "second class" carriers that never achieve a fair chance to compete with incumbent providers. The Telecom Act and the Commission's rules have always been designed – through interconnection, unbundling, resale, and number portability requirements – to treat all market participants as co-carriers, eliminating through regulation the substantial advantages of incumbency. Intercarrier compensation has been subject to the same statutory and regulatory model, as the Telecom Act and its implementing rules have, for the most part, ensured in theory that carriers receive fair compensation – cost plus a reasonable profit – for the transport and termination functions provided by competitive networks. A separate set of rules for interconnected VoIP traffic, in addition to having no statutory underpinning, could stifle competition from VoIP providers, which have introduced unique competitive products into new markets, often underserved by incumbents.

Ultimately, the net effect of reducing or eliminating access charges on IP-originated traffic is to force LECs and their current customers to subsidize the businesses and customers of the IXCs by forcing the LECs to bear costs currently borne by the IXCs. As such, a lower rate for IP-based traffic would give IXCs every incentive to increase the access minutes they deliver to LECs because they would no longer be responsible for the costs associated with terminating those minutes. Furthermore, with many of the largest ILECs now affiliated with the largest IXCs, the calls for reform are little more than an attempt to reduce the amount the IXCs, the largest users of independent carriers' networks, pay for such access to the detriment of those LECs, and in particular, to the detriment of smaller CLECs like Pac-West. Indeed, the recent epidemic of nonpayment of access charges has proven to be a highly effective tool for the RBOCs to put competitive pressure on their new entrant competitors. Unlike reciprocal compensation, unbundling, or interconnection, payment of access charges is not part of the Section 271 14-point checklist, which has provided a new loophole for the RBOCs to exploit.

In addition, adding another category of traffic to the intercarrier compensation regime would further convolute an already Byzantine system. As Verizon has explained:

> The system of widely varying rates based on arbitrary jurisdictional and technological distinctions is fundamentally unworkable in the modern, competitive communications market…. Providers devote substantial resources to the often impossible task of trying to measure and categorize the traffic they exchange in order to apply different rates to different types of traffic – a task that has become increasingly difficult in the age of IP services…. Nor can providers always determine whether incoming calls were IP-originated – or whether outgoing calls are IP-bound…. It simply no longer makes sense to maintain a system that requires or permits terminating providers to apply different rates to different traffic based on arbitrary and anachronistic distinctions.[12]

The Commission's focus in this proceeding should be on simplifying the intercarrier compensation system – not to complicate it further. If IP-based traffic is virtually indistinguishable from other traffic on the network, there is no justification for treating it differently.

Requiring carriers to pay access charges for the origination and termination of IP-based traffic is also consistent with market principles. Currently, IP-based application providers have won customers with lower rates and promises of unlimited long distance. However, these IP-

[12] Verizon and Verizon Wireless Comments – NBP Public Notice #19 at 17-18, GN Docket No. 09-51, *et al*, filed Dec. 7, 2009, (emphasis added).

based application providers have kept these promises by competing against traditional telephony in a skewed market where traditional carriers are required to pay access charges for terminating traditional calls, while carriers terminating IP-based application providers have not. Indeed, these IP-based application providers and the IXCs are thus able to offer lower cost services by avoiding access charges through a variety of methods such as claiming ESP exemptions, using improper trunks, or providing improper billing information. However, by requiring VoIP providers to compete in the same regulatory environment as traditional carriers, the Commission will ensure that market forces determine which technologies serve customers, rather than the Commission picking winners or losers via regulatory fiat.

Further, requiring LECs that terminate calls in IP-format to reduce or eliminate their access charges for those services will discourage those carriers from upgrading their network to IP-based networks. As the Commission is aware, upgrading from traditional TDM networks to IP-based networks is a major expense for most, if not all, LECs. This expense must be recovered over time from a combination of customer charges and access charges. To the extent that the Commission removes or reduces one of those two sources of revenue (here, the revenues provided by access charges), LECs will have to increase their customer charges. Faced with this dilemma, carriers will be incentivized not to upgrade their network at all and instead maintain the status quo – an outcome the Commission seeks to avoid.

Ultimately, the simplest, fairest and most cost-effective option for the Commission is simply to treat IP-based traffic as identical to any other type of traffic. To the extent that IP-based networks provide cost efficiencies that provide a business case for TDM-based carriers to transition to IP-based networks, carriers will respond to those market forces and make the appropriate investments. Technologies will compete on a level playing field on their own merits, and the benefits of IP-based networks will no doubt come to the fore. However, the Commission should not use the access charge system to prejudge the superiority or inferiority of any particular technology or to encourage IP-network deployment. Instead, the Commission should develop intercarrier compensation rules that allow carriers to compete on a level playing field without any carrier receiving a regulatory advantage based on traffic classifications that have no legal or policy justifications.

B. **The Commission Should Streamline The Process For CLECs To Obtain The Reasonable Compensation Owed To Them By CMRS Providers.**

By definition, "arbitrage" can only exist if the same good or service is exchanged at different prices.[13] As discussed above, the Commission has found the costs associated with terminating a call do not vary based upon what type of carrier is sending a call to be completed.[14] To the extent the Commission seeks to curb arbitrage opportunities, it should therefore put an end to the *de facto* ability of CMRS providers to obtain a different termination rate from CLECs, often $0.00, compared to what they compensate ILECs for the same service, or from what CLECs lawfully charge other carriers for the same services. Wireless carriers are extremely well-positioned to compete, having witnessed explosive revenue growth over the last two decades. The largest wireless carriers already benefit from their RBOC and IXC affiliations. Moreover, the relatively concentrated wireless market is soon to become even more concentrated if AT&T's acquisition of T-Mobile is approved. Despite these significant market advantages, wireless carriers continue to advocate for free and discounted traffic termination.

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13 *See, e.g., United States v. Cavera*, 550 F.3d 180, 196 n.14 (2d Cir. 2008) (noting that it is *different prices* that create an arbitrage opportunity); *Emerald Inv. Ltd. P'ship v. Allmerica Fin. Life Ins. & Annuity Co.*, 516 F.3d 612, 614 (7th Cir. 2008) ("An arbitrage opportunity arises when the same thing is being sold at two different prices and the difference is due to some oversight or other error, or to price discrimination.").

14 NPRM ¶ 495.

The Commission has stated repeatedly that "disparate treatment of entities providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers."[15] If the Commission truly wants to eliminate arbitrage and promote a level playing field for all carriers, it should not even consider creating the "CMRS-to-CLEC-intrastate-intraMTA-imbalanced-traffic" category proposed by CTIA.[16] These further invitations to balkanize traffic when it suits the requesting carrier cannot disguise the fact that CMRS providers simply want to continue their free ride on CLEC networks. While CMRS providers are quick to cry foul as to the threat of having to pay for the costs CLECs incur to terminate their traffic, these are carriers that have never paid Pac-West to terminate any of their intraMTA minutes. Logic – and the Commission's rules – dictate that carriers should be required to pay reasonable compensation before complaining to the Commission about the impact of such payments. In fact, at least two carriers have been making such payments to Pac-West for years, and both continue to thrive in the marketplace.

Those carriers that have chosen to refuse to make payments are already in violation of the Commission's rules. The Commission already mandates that CMRS providers must compensate CLECs for the work they perform in terminating the CMRS providers' customers' calls. Section 20.11(b)(2) of the Commission's rules states that a "commercial mobile radio service provider *shall pay* reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."[17] And as the Commission has stated, "[s]imilar types of functions should be subject to similar cost

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15 *See*, *e.g.*, *In re Matter of IP-Enabled Services*, 24 FCC Rcd. 6039, 6048 ¶ 15 (2009).

16 NPRM ¶ 672.

17 47 C.F.R. § 20.11(b)(2) (emphasis added).

recovery mechanisms."[18] Despite this, several CMRS providers have refused to pay either reciprocal compensation or access charges to carriers with whom they do not have a direct contractual relationship, arguing that in the absence of an agreement, a default bill and keep arrangement exists.[19] These carriers have every incentive simply to refuse to enter in an agreement, offer high volume and unlimited calling plans, and continue to reap higher margins off their free riding. There is nothing "reasonable" about bill-and-keep arrangements, however, when CLECs like Pac-West are legally obligated to incur the cost of providing service to CMRS providers for years without compensation when the ILECs with which Pac-West competes have secured market-based switching rates in excess of $0.01 per minute for the same services Pac-West provides.[20]

The Commission should make it clear at every opportunity that its rules continue in effect, that states have the right to set reasonable compensation rates, and to award compensation at those rates consistent with Commission precedent. CMRS providers have seized on every decision and appeal, including the recent MetroPCS appeal to the D.C. Circuit, as a poor and transparent excuse to delay payment on years and years of past due reciprocal compensation invoices. As the Commission considers this issue, it should make clear that contemplated future revisions and refinements to existing rules cannot legally preclude their ongoing enforcement.

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[18] *Intercarrier Further Notice*, 20 FCC Rcd 4685, 4702, ¶ 33.

[19] *See N. Cnty Commc'ns Corp v. MetroPCSA California, LLC*, File No. EB-06-MD-07.

[20] *See* Calif. Pub. Util. Comm. D. 06-05-040, Decision Confirming the Assigned Administrative Law Judge's Ruling Granting in Part the Motion for Enforcement of Decision 06-01-043, *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, Application 05-07-024* at 3-4 (May 25, 2006) (approving switching rate for AT&T of $0.0111 per minute).

There is also no basis to deny CLECs the same arbitration rights now possessed by ILECs pursuant to the *T-Mobile Declaratory Ruling*.[21] The Commission has previously found this rule change necessary to create regulatory balance in the negotiation process, since CMRS providers could invoke section 252 arbitration procedures against ILECs, but ILECs had no similar recourse against CMRS carriers. Section 332(c)(1)(B) of the Act, however, specifically requires the Commission to "order a common carrier to establish physical connections pursuant to the provisions of section 201" upon "reasonable request of any person providing commercial mobile service."[22] CMRS providers therefore have similar leverage over CLECs, and absent a CLECs' ability to compel arbitration before state public service commissions, CLECs will continue to be at a competitive disadvantage to their larger and more entrenched ILEC competitors. Indeed, in the last few years, the percentage of Americans living in a household with at least one cell phone subscription increased from 85% to 89%.[23] In contrast, during that same period, traditional switched access line subscriptions decreased by 13.3%.[24] The amount of traffic that CMRS providers will send to CLECs will therefore only increase, and the Commission must level the playing field by granting CLECs the same rights vis-à-vis CMRS providers that ILECs now possess.

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21 *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) ("*T-Mobile Declaratory Ruling*").

22 47 U.S.C. § 332(c)(1)(B).

23 Stephen Blumberg & Julian V. Luke, *Wireless Substitution: Early Releases of Estimates form the National Health Interview Survey, January - June 2011*, Center for Disease Control, Table 1 at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.

24 *Id.*

III. THE COMMISSION SHOULD PROCEED JUDICIOUSLY WITH RESPECT TO ACCESS STIMULATION

As a policy matter, the issue of "traffic pumping" has proven highly controversial, and rightly so. In a Telecom Act framework where transport and termination of traffic is legally subject to the recovery of cost-based compensation, considering rules that would carve back carriers' legal rights to recover for work performed to transport and terminate traffic is a precarious undertaking.

Pac-West has consistently taken the position that the best way to eliminate arbitrage is to establish uniform cost-based rates, from the top down. If in the meantime, the Commission is going to go further down the road of questioning which minutes are "good" minutes and which are "bad," a subjective endeavor that Pac-West does not endorse, it has at least started at the high end of the rate spectrum. Before extending this experiment of curbing switched access charges at the highest end of the scale to some of the lowest rates assessed by carriers, the Commission should first implement its current proposals and measure their success.

Fundamentally, however, the best way to eliminate rate arbitrage continues to be bringing access and reciprocal compensation rates to uniform, Telecom Act compliant Section 251(b)(5) TELRIC rates over time. There are myriad reasons not to extend the Commission's current "traffic pumping" experiment at this time.

First, there is nothing inherently wrong with one-way traffic flows.[25] In fact, over time, carriers have specialized in handling high-volume traffic flows. Superior quality services attract additional minutes of use. As long as the minutes are appropriately rated under the Telecom Act's 251/252 procedures, the volume of minutes should not make a difference. Before the

[25] *See Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236 (9th Cir. 1999) ("We fail to discern any public policy that Congress intended to further by denying such compensation to one-way paging carriers when, at the same time, Congress went to such great lengths to grant such carriers the right to interconnect and compete on an equal footing under the Act.").

Commission develops rules delineating "good" minutes and "bad" minutes of traffic, it should first ask the most obvious, telling question: if certain carriers actually feel that CLECs are making excess profits by serving particular customers, why do they not simply compete for that segment of the business? The answer, in Pac-West's view, is that certain entrenched carriers find it easier to cry "arbitrage" and "access stimulation" than to actually compete for and serve the complex and demanding needs of high-volume customers. Indeed, at every stage in the *Cook Telecom* case, the applicable tribunal found that the unidirectional nature of the traffic flow was irrelevant. The California Public Utilities Commission, this Commission, the district court, and the Ninth Circuit, all found that, where cost-based reciprocal compensation was concerned, one-way traffic was clearly compensable. The foundation of the case at every stage was this Commission's own finding that the direction of the traffic flow has no bearing on the compensability of the traffic.

Second, viewing traffic flows in isolation is misleading and meaningless. Pac-West has a robust business ***terminating*** minutes of use on a wholesale basis for other carriers. Pac-West's traffic termination business is a vibrant business and Pac-West pays to terminate every minute of use at tariffed and contract rates established with other carriers. Viewing only one aspect of a carrier's overall business without looking at other flows of traffic is therefore a senseless exercise. The same carriers that want discounted or free rates to originate their traffic would never acquiesce to the same rates nationwide to terminate exchange access and local traffic on their own networks. The Commission should not fall for this shell game.

Finally, Pac-West respectfully submits that the Commission's trigger in its proposed access stimulation rules will simply legitimize and encourage more self-help.[26] As discussed more fully below, massive IXCs abuse their market position by simply refusing to pay their much smaller service providers' Commission-approved tariffed rates for the access services they perform in handling the IXCs' traffic. Then, if the small provider does not accede to the IXCs' various demands, they are forced to incur the significant costs of bringing a collection action in court. If the Commission's current proposal takes effect, however, the IXCs will have one more arrow in their quiver of self-help: the IXCs will simply demand to see all of their competitors' highly-sensitive customer contracts before they agree to pay for the access services they take. The Commission must make clear that allegations of revenue sharing are not grounds for refusing to pay intercarrier compensation payments properly owed. Rather, consistent with extensive Commission precedent, carriers must dispute *and* pay in order for there to be a level playing field for all carriers.

IV. THE COMMISSION SHOULD ADOPT RULES TO ADDRESS IMPROPER FORMS OF CARRIER SELF HELP

As part of its intercarrier compensation reform, the Commission should also develop rules to ensure that carriers do not engage in anticompetitive self-help as a means of circumventing the Commission's intercarrier compensation rules. The primary means by which IXCs exert pressure on smaller carriers is the non-payment of access charges rather than paying and disputing according to the terms of the tariff, despite clear Commission precedent chastising IXCs for this very behavior.[27]

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26 NPRM ¶ 659 ("we propose to focus on revenue sharing arrangements between the LEC charging the access charges at issue and another entity that result in a net payment to that other entity over the course of the agreement.").

27 *Business WATS, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 7 FCC Rcd. 7942, ¶ 2 (Com. Car. Bur. 1992) ("a customer, even a competitor, is not entitled to the self-help measure of withholding payment for

Carriers are increasingly refusing to pay any intercarrier compensation charges, often without any meaningful disputes.[28] Carriers find it sufficient to parrot terms like "traffic pumping," "phantom traffic," or "VoIP traffic," but with no meaningful analytical support or legal underpinning to their disputes. The Commission and the state commissions have invested significant resources establishing rules and rates for access and reciprocal compensation. Without vigilant enforcement of payment obligations, the rulemaking and ratemaking proceedings of these and similar historical proceedings amount to little more than theoretical exercises. Unsupported nonpayment harms competition and retards the growth and development of the network that the intercarrier compensation was designed to support. As an economic matter, carriers delivering traffic have every incentive to engage in self-help and simply to refuse to pay an originating or terminating carriers' invoiced access charges. Intercarrier compensation disputes are complex, expensive to prosecute, and take an extremely long time to complete. During this time, the non-paying carrier retains the disputed amounts, while the terminating or originating carrier receives no compensation.

Indeed, this type of self-help provides particular benefits to IXCs and other similarly situated carriers, which by starving originating or terminating carriers of revenue, can force these carriers to accept unfavorable terms. As PAETEC recently described in its *ex parte* filing before the Commission:

> [Some] interexchange carriers … engaged in self-help the last time the Commission issued an order that allowed competitive local

tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations."); *Carpenter Radio Company*, Memorandum Opinion and Order, 70 FCC 2d 1756 ¶ 6 (1979) ("a customer has a legal obligation to pay all tariffed rates for telecommunications services . . . until such time as these rates are found unlawful by the Commission or a court of competent jurisdiction.").

[28] See, e.g., Qwest Opposition to Petition for Reconsideration, *All Am. Tel. et al. v. AT&T*, File No. EB-10-MD-003, at 21, at 10-11 (filed Mar. 4, 2011).

> exchange carriers a safe-harbor step-down to lower intercarrier compensation rates. By withholding payment of all interstate access charges until a competitive local exchange carrier "voluntarily" agreed to flash cut to the end point of mirroring RBOC interstate rates, the self-help engaged in by the largest interexchange carriers served to override the reasonable transition period adopted by the Commission.[29]

Indeed, those IXCs affiliated with RBOCs that serve in the same market as CLECs have additional incentives to engage in such behavior. Where access charges are not yet part of the Section 271 checklist, access nonpayment is a particularly effective tactic for IXCs who are affiliated with RBOCs fending off new entrant CLEC competitors. As the Commission noted in its NPRM, many carriers (and small carriers in particular) rely on access charges as a revenue stream. By denying other competitive LECs the revenue from the access charges which those competitors need to fund their business and expand their service areas and offerings, a non-paying carrier can consolidate further its already entrenched position in the marketplace.

The Commission should make clear that this type of self-help is impermissible. Any suggestion that such self-help is acceptable will only encourage such behavior in the future, and result in additional delays in IP-network deployment and will harm competition. As part of its intercarrier compensation proceeding, Pac-West urges the Commission to issue rules limiting the right of carriers to refuse to pay tariffed access charges, and instead require these carriers to assert their rights through legitimate legal channels such as the Commission's complaint process, the state public utility commissions, or the courts.

[29] Letter from Tamar E. Finn, Counsel for PAETEC, to Joel Kaufman, Associate General Counsel, Federal Communications Commission (Mar. 14, 2011), Enclosure A – Declaration of William Haas ¶ 8.

V. CONCLUSION

Pac-West appreciates the Commission's willingness to address the many broken aspects of the current intercarrier compensation system, and trusts that all consumers will benefit by a fair and predictable telecommunications ecosystem.

Respectfully submitted,

/s/

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